

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4183 OF 1999

and

CIVIL APPLICATION NO. 6067 OF 1999

and

CIVIL APPLICATION NO. 9132 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

=====

1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

RAJVIRSINH K RATHOD

Versus

PRINCIPAL D.M.PATEL

Appearance:

MR RC JANI for Petitioners

No one has appeared on behalf of respondent No.1 despite service.

Mr.Mukesh Patel, learned A.G.P.for Respondent No. 2, 3

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 13/07/1999 & 24/08/99

COMMON ORAL JUDGEMENT

1. Rule in this case was issued on 21.6.99 after notice to the respondents. Since the matter relates to

the admission of students in 11th Standard and the academic session has already started, the matter was taken up for final hearing right today. The affidavit in-reply dt.9.7.99 has been filed on behalf of respondents Nos.2 and 3 under the signatures of the District Education Officer, District Sabarkantha, Himatnagar. Affidavit-in-rejoinder dt.13.7.99 thereto has been filed. No one has appeared on behalf of respondent No.1 and no reply has been filed by respondent No.1 i.e. concerned School.

2. The petitioners herein seven in number were studying in Shri K.N.Shah Modasa Village High School at Modasa, District Sabarkantha. The said School is a Government aided School. While studying in the aforesaid School they appeared in the public examination of 10th standard held by the Gujarat Secondary Education Board in 1999 and have passed the same Examination. They are desirous of continuing their studies in the same School for 11th and 12th Standard and it is the common case of the parties that in this School there is Science stream also and they wanted to study in the Science stream. Petitioners have come with the case that they are not likely to get admission in this School as a policy decision had been taken to stop admission at 86% in the Science stream and whereas the petitioners have obtained percentage of marks lesser than 86%. These students, except petitioner No.3 i.e. Dhawalsinh Pandya, have been studying in the said School since 5th standard. It is also the case of the petitioners that the respondent School has entertained the applications for admission to the 11th Standard in Science Stream from the students of other Schools also and the result is that they are denied admission to the 11th Standard in Science Stream in the School from which they have passed the 10th Standard. It is also the case of the petitioners that respondent No.3 i.e. Higher Education Department had taken a decision that over and above 60 students in each class, only six more students will be accommodated, meaning thereby that $60+6 = 66$ students can be accommodated while in the said School there are 2 sections and, therefore, 132 students can be accommodated. But even this power of increasing number of students by 6 per session is not exercised and there is scope for admission of 120 candidates only in the said School in the Science stream in 11th Standard.

3. In the affidavit-in-reply, which has been filed on behalf of respondents Nos.2 and 3 through the District Education Officer, it has been held out that a policy decision has been taken by the State of Gujarat and a Circular/Resolution dt.6.11.85 had been issued and it is

given out that this Circular/Resolution was issued on the basis of certain orders passed by this Court. A reference has been made to Special Civil Application No.3252/84, Special Civil Application No.3336/84 and Special Civil Application No.3308/84 alongwith other matters. The respondents have taken the stand that in the State there are certain Schools which do not have Science stream and that the actual option for the student is available only from 11th Standard and, therefore, the students of those Schools, in which the education is available only upto 10th Standard and/or the Schools wherein the education is imparted upto 12th Standard but there is no Science Stream in those Schools and the students passing 10th Standard from such Schools i.e. where there is no further education for 11th and 12th Standard or where the students of 11th and 12th Standards were there but Science Stream are not available, are also to be considered and such boys of other schools, if they have a higher percentage of marks, they have to be given preference over the students of the Schools and it was for these reasons that the aforesaid Circular was issued and a decision was taken to put the maximum limit of 70% seats on the basis of merit from amongst the students who have applied in the very same school and 30% seats are reserved for other Schools from the total number of seats and further that reservation for the other backwards class and Scheduled Caste and Scheduled Tribe are also to be kept in view. In this background, the bifurcation of the seats of one School has been made as under:-

Out of total number of seats - 66:

1. 24 students of the same School.
2. 10 of the other School.
[30% students after deducting reserved
seats and School students.]
3. 18 students of O.B.C. category as per 27%
reservation.
4. 9 students of Scheduled Tribe as per 14%
reservation.
5. 5 students of Scheduled Caste as per 7%
reservation.

66

Whereas in the respondent-School at Modasa there are two sections of 11th Standard in Science Stream, the admission have to be made as under:-

1. 48 students of the same school.
2. 20 students of other schools.

3. 36 students of O.B.C.
4. 18 students of Scheduled Tribe.
5. 10 students of Scheduled Caste.

132

4. It is also given out that a list of 125 students was prepared as per the merit from amongst the applications, which had been received and 48 students of Modasa School had been admitted and from amongst the students of Modsa school itself against the number of 48 students were stopped at 173 marks and the admissions to the students from other schools were stopped at 190 marks. It is given out that the admission for the reserved seats are in process and according to the respondents, the position of the petitioners for the purpose of admission according to the merit list including the applicants of other schools is as under:-

Sr.No. Name Marks Sr.No.

----- ----- ----- -----

1. Rajvirsinh Rathod 107 121
2. Dwiti D. Shah 141 93
3. Dhawalsinh Pandya 111 117
4. Sujit Bhavsar 119 114
5. Jamil Upadhyay 101 124
6. Jigar Gandhi 142 90
7. Darshan Shah 141 92

5. It has also been stated that such admission policy is in consonance with the Rules and Regulations for admission as passed by the State of Gujarat after considering the decisions of the Gujarat High Court in the cases referred to hereinabove. It has also been pleaded that the power has been vested in District Education Officer to grant permission for 6 more seats, but he has no authority to go beyond the aforesaid policy and further that even with that, there would be increase of 12 seats only and such 12 seats also would be bifurcated as per the break-up referred to as above. It has also been submitted that there are number of other students in the merit list at the point wherefrom the general merit list has been stopped to the eligible number of students and, therefore, otherwise also the petitioners may not fall in the list of students to be admitted in the same School. A xerox copy of the Resolution dt.6.11.85 and a Resolution dt.10.6.97 and a xerox copy of the merit list, as prepared by the School, has been enclosed with the reply. These pleadings have

been sought to be controverted by way of rejoinder
dt.13.7.99.

24th August 1999:

6. On 13.7.1999, the further dictation of this order was deferred because the learned Asstt. Govt. Pleader was not able to produce the copies of the judgment rendered in Special Civil Applications Nos. 3252 of 1984, 3336 of 1984 and 3308 of 1984. Though, reference to these Special Civil Applications was given in para 4 of the affidavit-in-reply, the date of decision in these Special Civil Applications had not been given and, therefore, the files of these cases were called for so that the judgment rendered therein may be looked into on which the reliance was placed by the respondents. These files had to be summoned from the old High Court building and the same have been made available now. The Special Civil Application No. 3252 of 1984 was a petition filed by The Ahmedabad Jesuit Schools Society, challenging the Government Resolution dated 23rd April 1984. The Special Civil Application No. 3308 of 1984 was a petition filed by the Gujarat Law Society, challenging the same Resolution dated 23rd April 1984 and the Special Civil Application No. 3336 of 1984 was a petition filed by Deepak Mandal. In all these three petitions, the petitioners claimed to be the Public Charitable Trusts. It appears from the common judgment and order rendered by the Division Bench in Special Civil Applications Nos. 3252 of 1984 and 3336 of 1984 decided on 21st August 1984 that through the Government Resolution dated 23rd April 1984 Rules for admission were laid down with regard to the students desirous of seeking admission in the Science Stream of the higher secondary classes and the petitioner Trusts case was that the resolution imposed restriction at its right to administer its educational institutions and therefore, the same was unconstitutional and void. The reading of the contents of para 8 of this judgment shows that the controversy under consideration was with regard to the scope of the right of minority to administer an institution established by it and the right of students to seek admission to such an institution maintained by State aid, the Court observed that these are the matters covered by Article 30(1) and Article 29(2) of the Constitution of India. The Resolution dated 23rd April 1984 which was challenged was unfortunately not found to be available on the record of these petitions although in the Index of each of these petitions the same has been included. However, para 16 of the judgment is reproduced as under:

"16. The 20% reservation of seats is not entirely for the students who are unable to get admission despite merit on account of absence of higher secondary classes in the school from which they come out. That reservation is only with regard to 10% out of the 20%. Another 5% goes to students whose guardians are transferred from outside and yet another 5% goes to students who have studied in schools where there is higher secondary scheme, but due to other reasons they want to join some other school. The regulation in regard to a minority institution can be in the interests of excellence of education, but such a test should fail in regard to the students in the two categories for which 5% reservation each are made, for it can in no way be said that by admitting them into the institution the excellence of the institution could be improved or maintained. It could possibly be said, as argued by the Advocate General, that in regard to the 10% reservation for students from other schools who have no facility of education in those schools, the admission directed to be made being on the basis of the merits of the students, that would be conducive to the promotion of the excellence of the education since students of more merit than those that are sought to be admitted are coming in in that quota. But then the regulation by the impugned resolution cannot be said to have been intended for that purpose. It may perhaps achieve that purpose to some extent. The said regulation would have been permissible if its object had been maintaining the excellence of the institution. It is not as if admission to the school has been directed to be made on the basis of merit. The resolution cannot therefore be justified as against the minority institutions. Regulation in respect of a minority institution cannot be of the same character as regulation in respect of other institutions, for in the case of the latter public interest would necessarily be relevant, but that by itself would not be relevant in the case of a minority institution. In the form in which the resolution has appeared it would not be possible to sustain it even under Article 29(2) of the Constitution, for it is not intended as a measure to secure against discrimination under that Article. Therefore the impugned resolution will not be operative against the institutions which are the petitioners in these cases.

Consequently we hold that the resolution shall not be enforced against these institutions."

This para 16 also includes the operative part which gives some idea as to what could be the content and purport of the aforesaid resolution dated 23rd April 1999. From the reading of the contents of para 16 of the aforesaid order as has been quoted hereinabove, it is clear that the Court while deciding these matters was essentially concerned with the impact of the resolution and the justification thereof as against the minority institutions and the form in which the resolution had appeared, and the Court found that it would not be possible to sustain it even under Article 29(2) of the Constitution, for it was not intended as a measure to secure against discrimination under that Article. The Court, therefore, concluded that the impugned resolution will not be operative against the institutions which were the petitioners in these cases and it was held that the resolution shall not be enforced against these institutions. It appears from the contents of para 4 of the affidavit-in-reply filed in the present case that after the aforesaid decision dated 21st August 1984, the State of Gujarat had issued the Circular/Resolution dated 6th November 1985 whereby the procedure and the policy of admission had been framed. A copy of this circular dated 6th November 1985 has been placed on record along with the said affidavit-in-reply dated 9th July 1999 as Annexure.I and this Special Civil Application is opposed by the respondents on this ground.

7. I have considered the rival submissions made in this regard in the light of the pleadings the parties. I find that in the above judgment on the basis of which the Government Circular/resolution dated 6th November 1985 is said to have been issued Court had examined the resolution dt. 23rd April 1984 in the context of the matters of minority institutions only. In the case at hand, this Court is called upon to consider the controversy as to whether the students who pass one particular examination from an institution are entitled to get admission in the next higher class in the very same institution on the basis of preferential right in comparison to the students who come from other schools for admission. In this regard, learned Counsel for the petitioners has placed strong reliance on the decision of the Supreme Court in the case of *The Principal, Cambridge School and anr. v. Ms. Payal Gupta and ors.*, reported in AIR 1996 SC 118. In this case, the Supreme Court was directly concerned with the question of continuance of further studies in higher class in the same school with

regard to a student who pass the public examination while studying in that school and in this case it was held that the head of the educational institution is not authorised to prescribe a cut off level of marks for continuance of studies in higher class or a student who passes a public examination and therefore whether a student who passes Xth Std. which was a public examination of Central Board of Secondary Education in unaided recognised school, he cannot be denied admission to XIth class of the same school by the head of the institution by prescribing cut off level of marks. The Supreme Court examined the whole scheme of the Delhi School Education Act, 1973 and Delhi School Education Rules, 1973 and found that once a student is admitted to a school, the same admission continues class after class until he passes the last examination for which the school gives training and no fresh admission or re-admission is contemplated from one class to any other. In a higher secondary school, the examination of Xth class cannot be regarded as a terminal examination for those who continue to study XIth and XIIth class of the said school. No separate criterion has been laid down in the rules for the students passing class Xth and wishing to continue their studies in XIth and XIIth classes. The question of an admission test or the result in a particular class or school for purposes of admission would arise only if a student of one institution goes for admission in some other institution. The question of admission test on the basis of result in a particular class will not be taken into account in the case of a student of the same school who passes the public examination. The relevant observations in this regard have been made in the judgment of the Supreme Court in paras 6, 7 and 8. The observations made by the Supreme Court in this case in end of para 6 are quoted as under:

"....Once a student is given admission in any educational institution the same continues class after class until he leaves the school. In these facts and circumstances it is difficult to accept that after a student passed his tenth class of a public examination his admission to the next higher class i.e. eleventh class would be a fresh or readmission."

This Court finds that even if any circular or resolution dated 6th November 1985 had been issued by the respondents in the context of the judgment rendered on 21st August 1984 in Special Civil Application No.3252 of 1984 and 3336 of 1984, the same cannot hold good as now the law as has been laid down by the Supreme Court in the

aforesaid decision in the case of Principal, Cambridge School (supra) holds the field and in the aforesaid decision, the Supreme Court has in no uncertain terms upheld the preferential right of a student of the same school to carry on his studies in the next higher class in the very same school and once that school has admitted that student, such admission continues class after class until he leaves the school.

8. Learned Asstt.Govt.Pleader has submitted that there are schools wherein there is no Science stream in XIth and XIIth std. and there were schools where the education is imparted only upto the level of Xth std. and therefore, the students having higher merit from other schools at Xth std. examination cannot be excluded from consideration if they seek the Science stream in another school on the basis of their higher merit at the public examination of Xth std. because such students cannot get the Science stream in their own school in want of the availability of the course of Science stream or in want of availability of the higher classes as such. It is for the framers of the educational policies and for those at the helm of the affairs of the matters to deal with such cases and they may find appropriate means and ways and take such measures to take care of such cases and such cases may also be considered for admission in other schools after accommodating their own students who have passed the public examination of Xth std. while studying in that school itself. It can also be conceived that the students for whom it is now said that they have obtained the higher merit in the public examination of Xth std. while studying in a school where there is no Science stream or a school where there were no higher classes beyond the Xth std. may not have been able to get admission directly at the initial stage in such schools where the studies are available upto XIIth std. with the facility of Science stream and thus they may have failed and fallen short of merit, at that time while seeking admission in such schools at the initial stage, may be that they by their effort put in at the recent public examination of Xth std. have been able to make a higher merit, but that by itself should not operate to the prejudice of the students of any school where higher classes are available with Science stream and whereat they have been studying from beginning. In order to illustrate the point, learned Asstt.Govt. Pleader Mr.Patel has invited the attention of the Court to the total number of seats and that there were only two sections of XIth std. with Science stream and has also pointed out that they have bifurcated the seats in the respondent school at Modasa in two sections of XIth std.

Science stream, i.e. 48 students of the same school, 20 students of other schools, 36 students of OBC, 18 students of Scheduled Tribe and 10 students of Scheduled Caste and he has also submitted that a list of 125 students was prepared as per the merit from amongst the applications which had been received and 48 students of Modasa school had been admitted and the admissions had been stopped at 173 marks and the admission to the outside students had been stopped at 190 marks. It was given out that the admissions for reserved seats were in process and the position of the petitioners for the purpose of admission according to the merit list was far below the mark of 173. I called upon the learned Asstt.Govt. Pleader to show that had the students of other schools not been considered, whether the petitioners would have got admission in the same school or not and in answer thereto, it has been pointed out that in case all the seats, i.e. 132 seats been made available to the students of the respondent School at Modasa in the XIth std., the petitioners could have got admission in XIth std. In such background whether the District Education Officer increases the number of seats or not, the preferential right of the students of this school for the purpose of admission in the XIth std. in the very same school against the total seats even without the increase of the number of seats as is permissible to be made by the District Education Officer, the petitioners may get admission. The case of the petitioners is that even if the total number of seats is 124, they stand between Sr.No.90 to 124.

9. Whether the admission is denied by putting a cut off line or by taking students of other schools makes little difference because ultimate result is denial of total number of seats to the students of present school. In view of the law laid down by the Supreme Court in the case of Principal, Cambridge School (supra), the right of the present petitioners to seek admission in the Science stream in XIth std. in the very same school, from which they have passed the public examination of Xth std. cannot be made to be feasible on the basis of reasons given by respondents nor it can be made to be sacrificed at the altar of the students coming from other schools merely because in the last public examination of Xth std. they have obtained higher merit. No centralised admission policy in this regard has been followed so as to be applicable to such schools all over the State. In absence of such a centralised policy for admission based on all over merit of all the students passing the Xth std. public examination from various schools all over the State, it cannot be left open to the schools to deny

the admission to the students of their own school by choosing the students of other schools for admission in the XIth std. The case of the respondents with regard to fixing the number of seats for different categories, i.e. students of the same school, other schools and the percentage of seats after deducting the reserved seats and school students, the student of OBC category and the students of Scheduled Tribe or the students of Scheduled Caste etc. and to bifurcate the number of seats accordingly would certainly run counter to the rights and interests of those students who are studying in the very same school and who have passed the qualifying public examination of Xth std. for admission to XIth std. while being students of such schools and they have to be allowed to continue their studies in the very same school till the last standard for which the education is imparted by such school. It is never meant that the students coming from other schools cannot be considered or that they are to be excluded outright, the correct principle to be applied in such cases only limits their right of consideration to the extent that after accommodating all the students of the very same school who are desirous to continue their studies in that school, if any seats remain available, they may be utilised for students coming from the other schools on the basis of their merit. The principle as has been laid down by the Supreme Court in the aforesaid case is simply the principle of institutional preference which has been recognised in large number of judicial pronouncements by various High Courts as also by the Supreme Court and what the petitioners in the present case seek to enforce is only such right of institutional preference and all that they want is that they should be allowed to continue their studies in their own parent school where they have been studying from the initial stage and wherefrom they have passed their qualifying examination and once they are accommodated against the available number of seats, if any seats remain available, they may be filled up from amongst the students who come from other schools. The difficulty faced by such students who have passed the public examination of Xth std. from other schools and if they are desirous of admission for Science stream in schools other than the one wherefrom they have passed Xth std. because Science stream is not available in their school for further studies, or because there are no higher classes beyond Xth std. in the school wherefrom they have passed, may certainly be a matter which must invite the attention of the concerned authorities to evolve a proper and uniform policy without affecting the interests of the students of the parent school.

10. For the reasons as aforesaid, this Special Civil Application succeeds and the respondents are directed to consider the petitioners cases for admission to the XIth std. in Science stream according to their merit and in preference to the candidates coming from other schools and after accommodating all the candidates who have applied for XIth std. after passing the Xth std. examination from the very same school, if any more seats remain available, only such number of seats shall be utilised for the purpose of admission to the students coming from other schools. In case the admissions have already been finalised and the students coming from other schools have already been admitted, and such students are continuing their studies in this school, i.e. Shri K.N.Shah Modasa Village High School, their admission and the studies shall not be interfered with or adversely affected by this order. The petitioners had approached this Court through this Special Civil Application on 15th June 1999, i.e. at a point when the admissions were to be finalised, the process of judicial adjudication in such cases itself takes some time as it has taken in the instant case and therefore, merely because the outcome of this Special Civil Application has come now in August 1999, their rights and interests shall not be jeopardised and respondents are directed to take appropriate measures and steps by creating additional number of seats to the extent necessary, in case all the seats have been utilised upto now. When the petitioners are to be considered on the basis of their preferential right, for admission in the Science stream of XIth std. as upheld by this Court, their admission and prospects of studying the course shall not be made to suffer any prejudice either in the matter of attendance or otherwise merely because of the late admission now after passing of this order.

11. Learned Counsel for the petitioners has invited the attention of the Court to a Civil Application No. 6067 of 1999 moved in this Special Civil Application by two more students claiming that their cases are exactly identical to the original petitioners herein and that they too had passed the qualifying examination from Shri K.N.Shah Modasa Village High School and had the students of other schools not been considered for admission, they too would have been admitted in the said school in the Science stream in XIth Std. according to their merit between Sr.Nos.90 to 124. So far no order had been passed in this Civil Application and it has remained pending as it is. In the facts and circumstances of this case, it is ordered that in case the respondents find that the cases of the present applicants are identical to

the cases of the original petitioners, the respondents may also extend the benefit of this judgment to these two applicants and take steps accordingly. No further orders are required to be passed in this Civil Application No.6067 of 1999 and the same stands disposed of accordingly.

12. In view of the order passed in the main Special Civil Application, no orders are required to be passed in Civil Application No.9132 of 1999. The same stands disposed of accordingly.

13. This Special Civil Application is allowed in terms as contained in para 10 of this order as aforesaid and the Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

sreeram.